1992

Beatrice N. Thomas v. David L. Midgley, Melanie Midgley, and John Does 1-10 : Petition for Rehearing

Utah Court of Appeals

Steven C. Tycksen; Attorney for Respondent.
Robert F. Babcock; Walstad & Babcock; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

BEATRICE N. THOMAS,	:	
Plaintiff,	:	**PETITION FOR REHEARING**
vs.	:	
DAVID L. MIDGLEY, MELANIE MIDGLEY, and JOHN DOES 1-10,	:	Case No. 920446-CA
Defendants.	:	

Appeal from the Judgment of the Third
Judicial District Court in and for Salt Lake County
The Honorable Kenneth Rigtrup

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LIST OF PARTIES TO THE PROCEEDING BELOW

The following persons are parties to the proceeding below: BEATRICE N. THOMAS, an individual living in Salt Lake County; DAVID L. MIDGLEY, an individual who lived in Salt Lake County during all relevant times pertinent to this action who presently lives in the State of Illinois; and MELANIE MIDGLEY (SHORT), an individual living in Salt Lake County.

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JURISDICTION AND PETITION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Annotated § 78-2a-3(2)(k). Appellant petitions this Court for rehearing under Rule 35 of the Utah Rules of Appellate Procedure.

STATEMENT OF THE PETITION AND RELEVANT FACTS

I. Statement of the Petition

1. This is a petition for rehearing from the Memorandum Decision entered by this Court on January 13, 1993. (See Addendum)

2. This petition originates from an appeal from a final Order and Judgment of the Third Judicial District Court in and for Salt Lake County, State of Utah. (See R. 157-59)

3. The final Order and Judgment was entered on February 13, 1991 after a trial to the bench to the Honorable Kenneth Rigtrup. (See R. 157-59)

4. The Findings of Fact upon which the final Judgment is based were also entered by the trial court below on February 13, 1991. (See R. 146-56)

5. The Notice of Appeal was filed with the Third Judicial District Court on the 14th day of March, 1991. (See R. 160)

II. Statement of the Relevant Facts

This petition incorporates by reference the "Statement of the Releveant Facts" contained in Appellant's Brief.

SUMMARY OF PETITION

The Court erred in its Memorandum Decision by stating that Appellant does not appeal from the trial court's decision as to the $10,150 promissory note. The Court goes on to state that it need not address the issue relating to whether the trial court correctly allowed Melanie Midgley to assert the affirmative defense of the statute of limitations on behalf of David Midgley.

The trial court found that the above mentioned $10,150 promissory note was valid and enforceable. The trial court, however, denied the recovery against either David or Melanie Midgley of any payments that were due more than six years before the filing of the complaint. The trial court found that the statute of limitations pled by only Melanie Midgley barred any recovery against her and also David Midgley who did not plead the defense.

Ms. Thomas appealed this decision and the determination that David Midgley, a different defendant, be protected by the statute

of limitation defense pled by another defendant when he did not plead said affirmative defense. It is the Appellant's position that being an affirmative defense, each party must plead the defense on their own behalf. If the party fails or chooses not to plead the defense, as in this case, they are not entitled to the protection of such defense.

Therefore, the statute of limitations does not bar recovery for any installment payment due within the six year statute of limitations period with respect to Melanie Midgley. Simply stated, the statute of limitation defense protection should not be given to David Midgley due to the fact that he did not plead that defense. This Court must address this issue on rehearing and make a determination as to the statute of limitation defense as it applies to David Midgley and the $10,150 promissory note.

The Court erred in ruling that no consideration was given for the $20,000 promissory note signed by David Midgley. Furthermore, this Court and the trial court failed to address in their decisions the fact that the Midgleys wrote off the $20,000 on their joint tax returns indicating that a transfer had taken place.

The shares of stock that were given in exchange for the note may not have met all the formalities for transfer, but there was a meeting of the minds as to the transfer and each party acted as if the exchange was valid. David Midgley received benefits from the possession and "ownership" of the stock by writing off $20,000 on the joint tax returns filed by him and the Melanie Midgley over the

next seven years. There was consideration given for the note and benefits claimed and realized by the Midgleys from such transfer.

This Court failed to address the trial court's ruling that the $20,000 note's optional acceleration clause was deemed to have been exercised. The trial court's decision is clearly an error of law and must be reversed. For an optional acceleration clause to be activated, the holder of such note must make an affirmative act before such clause will take effect. The trial court found that no such act was taken in this case. Nevertheless, the trial court found that since the Ms. Thomas had the right to accelerate said note, she was deemed to have accelerated the note and the statute of limitations barred recovery against both David Midgley and Melanie Midgley.

ARGUMENT

I. DAVID MIDGLEY RECEIVED CONSIDERATION FOR THE $20,000 PROMISSORY NOTE AND ACCOMPANYING MORTGAGE.

The trial court, at the end of the Plaintiff's case in chief ruled that the $20,000 promissory note was unenforceable against David Midgley because the statute of limitations had expired. (The petitioner addresses the issues surrounding this portion of the decision in Section II of this petition). At the completion of the trial, the trial court additionally found that the $20,000 note was unenforceable as against David Midgley because there was "no consideration for the promissory note since there was no legally effective assignment and/or delivery of the stock in Land O' Harvest Corporation by [Ms. Thomas] to the [Midgleys]." This Court upheld this ruling even though the overwhelming evidence presented

at trial and surrounding circumstances indicate that consideration was given, particularly by David Midgley.

Mrs. Thomas invested $20,000 in Land O' Harvest, a corporation of which David and Melanie Midgley were both principals, for which she received 200 shares of said corporation. (See R. 147) Mrs. Thomas and the Midgleys subsequently met with an attorney, Mr. Kent Larsen, to discuss a way to protect Mrs. Thomas' interest. (See R.147) A preliminary agreement was reached by which Ms. Thomas would assign all of her shares (200) of Land O' Harvest to David and Melanie Midgley in exchange for a promissory note together with a mortgage on the home of the Midgleys to secure the note. (See R. 147)

An assignment agreement was prepared together with a promissory note and a mortgage. (See R. 148) Ms. Thomas gave the stock certificate to the Midgleys. (T. 260-61; 274) Even though the Midgleys had possession of the certificate, due to an oversight, the stock certificate was never endorsed by Mrs. Thomas. David Midgley testified that he signed both the promissory note and the mortgage. (T. 243; 256; Exhibit #27) Melanie Midgley Short testified that she signed the mortgage which was used to secure the promissory note. (T. 142; Exhibit #4) The mortgage was properly recorded with the Salt Lake County recorder. (T. 16-17; 258-263)

The trial court stated that the promissory note was valid against David Midgley and a cause of action arose upon the first defaulted interest payment. (R. 104) David Midgley knew of the exchange of the promissory note for the assignment of stock. It is

clear as to the intent of the parties for making such an exchange. David Midgley benefitted from this assignment by believing and acting as though he owned the stock. Notably, he deducted, as losses, on their joint tax returns, the value of the stock. (See R. 30; Exhibit #12; T. 265-70; 155-56)

David Midgley answered the Complaint and Crossclaim indicating that the transaction had taken place and he and Melanie Midgley received benefit. (See R. 30) David Midgley later testified and it is clearly represented in the tax returns that the stocks were written off as business losses by both David and Melanie Midgley. (T. 267-70)

Along the same line of reasoning, Mrs. Thomas, acting upon the presumption that the assignment was valid, was not able to do the same. She forfeited her legal right of being able to write off the losses of stock from her tax returns.

Melanie Midgley claims that there is collusion or potential collusion regarding these transactions between Ms. Thomas and David Midgley because of their divorce. This is clearly not the case due to the fact that all of these transactions occurred while David Midgley and Melanie Midgley were still married. The transaction was made and the stocks were being written off on their joint tax returns over a period of time exceeding seven years before their divorce. Such a contention is used only to confuse the true issues surrounding this case.

In further support of Mrs. Thomas' contention, even if the trial court were to find that there was no formal assignment and/or

delivery, through the meeting of the minds and performance on the part of both parties, a binding contract was formed. It has been held that a contract, although not enforceable, may nevertheless become valid and binding to the extent that it has been performed; and after a contract has been executed on both sides the question of consideration becomes immaterial. 17 C.J.S. Contracts Sec. 71.

By looking at the actions of all the parties involved, it is clear that even though there may have existed some technical problems, the intent and understanding of the parties is clear. At a minimum, both David Midgley and Mrs. Thomas intended for such transfers to occur and proceeded to act as if such had occurred. Both parties acknowledge that the transaction occurred. (See R. 30, T. 16-17; 247; 256; 286-87) David Midgley did receive possession of the stock. (T. 260-61; 274) Thereafter, he wrote off their value of $20,000 as losses on their joint tax return. (See R. 30; T. 265-70; 155-56) To hold that no transfer occurred would not only allow the Midgleys to receive the benefit of writing off the losses for the stock on the joint tax returns, but would as well relieve David from the note and David and Melanie from the mortgage signed to secure. This would put them into a can't lose situation and Mrs. Thomas into a can't win situation.

For a contract to be valid, there must be consideration given by both parties. At every stage of the relationship between Mrs. Thomas and the Midgleys, consideration was given by both parties. It is uncontroverted that Mrs. Thomas made an initial investment of $20,000 for which she received 200 shares of stock.

Mrs. Thomas then gave her 200 shares of stock to David Midgley for which she received a promissory note and a mortgage to secure such note. (T. 260-61; 274) Both Mrs. Thomas and David Midgley testified that this assignment was made to the Midgleys. (T. 16-17; 258-263) Benefits were conferred to both parties in each of these transactions.

The trial court in this matter decided that in the second transfer, the assignment of stock in exchange for the note and mortgage, was invalid due to lack of delivery and no consideration given. The trial court ignored the uncontroverted evidence and errored in finding as such.

The Court failed to correctly find that even though defects may have been present in the assignment and/or delivery of stock, the clear intent and performance by David Midgley and Ms. Thomas would correct the defects creating a valid transfer by which they should be bound. To hold otherwise would violate the equitable powers that the Court possesses.

Therefore, the promissory note signed by David Midgley and the mortgage signed by David and Melanie Midgley are valid and Ms. Thomas should be entitled to enforce them in order to satisfy the debt owed.

II. A CAUSE OF ACTION FOR AN INSTALLMENT PAYMENT ON A PROMISSORY NOTE CONTAINING AN OPTIONAL ACCELERATION CLAUSE ARISES WHEN THE INSTALLMENT IS NOT PAID. AN OPTIONAL ACCELERATION CLAUSE WILL NOT SELF-EXECUTE AND MUST BE ACTIVATED BY AN AFFIRMATIVE ACT ON THE PART OF THE HOLDER.

This Court did not address this issue in its decision due to the fact that it dismissed Appellants claim to the $20,000 note due

to "failure of consideration". The Court on rehearing must address this issue due to the following considerations.

The trial court initially ruled against Ms. Thomas in its enforcement of the $20,000 note against David Midgley because the Court determined that the optional acceleration clause contained in the note was "deemed" to have been exercised by Ms. Thomas. The finding was made despite that fact that Ms. Thomas made no attempt whatsoever to exercise this acceleration clause. Making such a finding, and applying the statute of limitations defense pled by another defendant in the action to David Midgley, the trial court ruled after the Plaintiff's case in chief that the $20,000 note was therefore unenforceable against David Midgley by reason of the statute of limitations.

At the completion of the trial, the trial additionally found that the $20,000 note was unenforceable as against David Midgley because there was a failure of consideration. However, as was analyzed in the Section I of this Petition, there is no "failure of consideration" for the $20,000 promissory note signed by David Midgley as in pertains to David Midgley.

As such, the Court must address the issue presented in the original Appellant's Brief relating to the trial court's interpretation of "optional" acceleration clause and the trial court's determination that the acceleration clause was "deemed" to have been exercised.

The Petitioner requests that the Court review the Section I of the Appellant's Brief as it analyzes in detail this issue.

However, the Petitioner will provide a brief summary in this Petition.

The $20,000 promissory note contained an acceleration clause which in part stated:

> "If the holder deems herself insecure or if default be made in payment of the whole or any part of any installment at the time when or place where the same becomes due and payable as aforesaid, then the entire unpaid balance with interest as afforded, shall, **at the election of the holder** and without notice of said election, at once become due and payable..." (emphasis added) (Exhibit #27).

This type of clause is known as an "optional" acceleration clause. These clauses were created for the benefit of the holder of the note and provides the holder with the opportunity, if she so desires, to accelerate the note making it due and payable immediately. However, if the holder does nothing and/or has no desire to accelerate the note, the clause remains dormant and the note is treated as a normal installment note with periodic payment due dates.

The trial court, however, wrongly interpreted that this clause, without any act by Ms. Thomas, accelerated the entire note due and payable upon the first default (cause of action) on August 18, 1978. In so doing, the trial court further erroneously held that the six year Statute of Limitations (78-12-23 Utah Code annotated) which bars recovery for any "cause of action" on a written obligation was applicable to the entire accelerated note.

The trial court's determination that the acceleration clause found in the promissory note signed by David Midgley automatically

matured the entire obligation upon the default of the first payment was incorrect and must be reversed.

In light of the existing facts and applicable case law as set forth in Appellant's Brief, the acceleration clause embodied in the promissory note held by Mrs. Thomas was clearly optional. Because Mrs. Thomas did not elect to exercise her option, the note was not accelerated. The failure to make an installment payment is a cause of action which triggers an individual statute of limitations as to the past due installments. Therefore, Ms. Thomas is barred from recovering only those annual interest installment payments whose individual statute of limitations have run. All other installment payments do not violate the statute of limitations and Mrs. Thomas is entitled to those payments. Further, as is in the contention of Ms. Thomas, the statute of limitations' defense should not be applied to David Midgley's obligations. (See below for analysis)

III. THE DEFENSE OF STATUTE OF LIMITATIONS IS AN AFFIRMATIVE DEFENSE WHICH MUST BE PLED BY THE DEFENDANT CLAIMING SUCH AS A DEFENSE OR SUCH DEFENSE IS DEEMED WAIVED.

This Court failed to address this issue in its Memorandum Decision. The Court indicated that the Appellant did not appeal from the portion of the judgment relating to the $10,150 promissory note. This is not the case. Ms. Thomas did appeal this portion of the judgment arguing that the trial court erroneously applied the statute of limitations defense to David Midgley. Such an application of affirmative defense to a defendant who did not plead the same is erroneous. Ms. Thomas did appeal this issue in the

Appellant's Brief and this Court must address this issue on rehearing.

Once again, please review Section II of Appellant's Brief where this issue is analyzed in more detail. However, excerpts from the Appellant's Brief are provided here in this Petition in summary form.

The Utah Rules of Civil Procedure state that the defense of statute of limitations is classified as an affirmative defense. As such, the Rules require that these affirmative defenses must be set forth "in pleading to a preceding pleading." (URCP 8(c)). The Rules go on to state that "a party waives all defenses and objections which he does not present either by motion . . . or in his answer or reply." (URCP 12(h)).

In this case, David Midgley, being separated from and acting independent from Melanie Midgley Short, did not plead at any time in his Answer (see R. 30) or by a motion the statute of limitations as a defense to the claims against him. Rather, he acknowledged that the money was owed to Ms. Thomas. Melanie Midgley, being separated from and acting independent from David Midgley, did raise in her pleadings the statute of limitations as an affirmative defense. (See R. 18)

Judge Rigtrup decided, as a matter of law, that the affirmative defense of statute of limitations pled by Melanie Midgley applied as well to David Midgley. (R. 110) After being questioned as to such a holding, Judge Rigtrup the next day acknowledged that there may be no legal basis for such a decision.

Addressing this issue he stated, "I reached a conclusion. Whether that's right or wrong, perhaps might be novel." (R. 112)

It is well established that each defendant to an action must raise the affirmative defense of statute of limitations in a responsive pleading or it is deemed waived. David Midgley acting independently chose not to raise such a defense and therefore cannot be granted the protection of such defense by the independent acts of a separate defendant. The holding by the trial court that the statute of limitations barred recovery against David Midgley as to both promissory notes was in error and must be reversed.

IV. MELANIE MIDGLEY AND DAVID MIDGLEY EXECUTED A VALID MORTGAGE ALLOWING THEIR INTERESTS IN THE PROPERTY TO ACT AS COLLATERAL ON THE $20,000 NOTE SIGNED BY DAVID MIDGLEY.

This Court states in its Memorandum Decision that Melanie Midgley by signing the mortgage would be an "accommodation maker" for the promissory note. The Court, however, ruled that the $20,000 promissory note was invalid because of failure of consideration, thus vitiating the mortgage. As was analyzed above, consideration was given by at a minimum David Midgley and an enforceable promissory note was created as between David Midgley and Ms. Thomas. As such, the mortgage is not vitiated, but is enforceable against the interests of David Midgley and Melanie Midgley.

Melanie Midgley testified that she was at the meeting in Mr. Kent Larsen's office and understood that an assignment of stock and promissory note were to be drawn up. (T. 139-40; 143; 155) Melanie Midgley testified that she had seen the promissory note and that

she signed the mortgage which was used to secure the promissory note. (T. 142)

For more detail regarding this issue, please review the analysis found in Section IV of the Appellant's brief. However, in summary, with this valid promissory note and the Court's correct determination that Melanie Midgley is an accommodator of the note, Ms. Thomas is therefore entitled to foreclose the mortgage which is collateral for the promissory note.

CONCLUSION

As has been discussed above, the trial court errored in determining that the acceleration clause contained in the $20,000 promissory note was automatic in nature. The acceleration clause was in fact optional and Ms. Thomas did not elect to accelerate the note. The trial court errored in deeming the promissory note accelerated thereby extinguishing Ms. Thomas's claim due to the statute of limitations. This determination must be addressed and reversed on rehearing.

The trial court held that the promissory note was not enforceable as to David Midgley because it was time barred by the statute of limitations. This Court, by reversing the decision as to the acceleration clause, would therefore reinstate the promissory note as to David Midgley which is secured by a valid mortgage signed by both David Midgley and Melanie Midgley.

With respect to the statute of limitations affirmative defense, the Court must also reverse the trial court's application

of such a defense to David Midgley who did not assert it. There is no legal basis for such an application. By so doing, in combination with the reversal as to the optional acceleration clause in the $20,000 note, all of the note's annual interest payments plus the principle amount would be enforceable and recoverable against David Midgley. This reversal regarding the statute of limitations would also modify the trial court decision to bar recovery against David Midgley with respect to the $10,000 promissory note. This would entitle Mrs. Thomas to recover the entire outstanding balance owed on the $10,000 promissory note against David Midgley.

Nevertheless, if this Court did apply the affirmative defense to David Midgley and only reversed as to the optional acceleration clause and find consideration for the $20,000 promissory note between David Midgley and Ms. Thomas, Ms. Thomas would be barred from recovering only those annual interest payments that were due more than six years before the commencement of this action. Regardless of these two alternatives, the enforceable promissory note is secured by a valid mortgage signed by both David Midgley and Melanie Midgley.

The Court's decision upholding the trial court's finding that the promissory note was not enforceable due to lack of assignment and/or delivery must be reversed. As was discussed in the brief and this Petition, this was an error as a matter of law. By reversing this finding, the promissory note would be enforceable against David Midgley.

As such, the fact remains that Melanie Midgley did sign a valid mortgage to secure the $20,000 promissory note. As such, the collateral (mortgage) which she executed to secure the note may be foreclosed upon to satisfy the balance owed on the note.

Ms. Thomas is therefore entitled to enforcement of the $10,150 promissory note and interest payments against the property and enforcement against Melanie Midgley for the payments which do not violate the six year statute of limitations defense which she pled.

Ms. Thomas is likewise entitled to enforcement of the $20,000 promissory note and interest payments against the property.

This petition is hereby certified to be brought in good fail and not for delay and it respectfully submitted this 27th day of January, 1993.

WALSTAD & BABCOCK

By: Robert F Babcock
Robert F. Babcock
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Rehearing was mailed, postage prepaid, this 27th day of January, 1993 to:

Steven C. Tycksen
Attorney for Respondent
45 East Vine Street
Murray, Utah 84107

Carla R. Tobbs

ADDENDUM

IN THE UTAH COURT OF APPEALS

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Beatrice N. Thomas, Plaintiff and Appellant, v. Melanie Midgley; David L. Midgley; and John Does 1-10, Defendants and Appellee.	)	MEMORANDUM DECISION (Not For Publication) Case No. 920446-CA F I L E D (January 13, 1993)

Third District, Salt Lake County
The Honorable Kenneth Rigtrup

Attorneys: Robert F. Babcock, Salt Lake City, for Appellant
Steven C. Tycksen, Murray, for Appellees

Before Judges Greenwood, Jackson, and Orme.

GREENWOOD, Judge:

Appellant, Beatrice Thomas, appeals from a judgment entered after a bench trial. Thomas sued her son, David Midgley, and his former wife, Melanie Midgley, on two promissory notes. Proceedings against David were stayed by his filing of a bankruptcy petition. As a result, judgment was entered only as to the claims against Melanie, and Melanie is the sole appellee before us. We affirm.

Both David and Melanie signed a promissory note in the sum of $10,500.00 in favor of Thomas, secured by a mortgage on their then jointly owned home. The note provided for monthly payments and contained no acceleration clause. The trial court granted Thomas judgment on this note for all payments which accrued during the six years prior to filing of her complaint, the date the statute of limitations expired. Thomas was also awarded a decree of foreclosure on the property securing the note. Thomas does not appeal from this portion of the judgment, nor does Melanie.

A second promissory note in the principal sum of $20,000.00 was signed by David only, but was never delivered to Thomas. Apparently the original plan was that Thomas would transfer stock to David and Melanie for the note. Both David and Melanie signed

a mortgage securing the note. The stock was not delivered or endorsed by Thomas and an assignment of the stock was prepared but not executed. Testimony differed as to whether the transaction was ever completed. Melanie testified that it was not and that a gift was intended by Thomas.

The trial court found Melanie was not liable on the note and the mortgage was not enforceable on the bases that (1) there was no consideration for the note; (2) the statute of limitations barred recovery; and/or (3) the statute of frauds barred recovery against Melanie. We affirm on the bases that Melanie had no direct liability on the note because she did not sign it, thus failing to comply with the statute of frauds,[1] and further, that even if she executed the mortgage as an accommodation maker, there was no consideration for the note,[2] thus vitiating the mortgage. A trial court's findings of fact must be affirmed unless they are clearly erroneous. Utah R. Civ. P. 52(a). We will reverse only if the findings are clearly against the weight of evidence or we are otherwise convinced a mistake has been made. Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P.2d 1376, 1377 (Utah 1976). In particular, we give deference to the trial court's determinations of credibility. Henderson v. For-Shor Co., 757 P.2d 465, 473 (Utah App. 1988). Although the evidence concerning consideration in this case was disputed, there is sufficient evidence in the record to support the court's conclusions that the transaction was not consummated, there was no meeting of the minds, and the court could fairly infer that Thomas intended a gift to her son.

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1. See Utah Code Ann. § 25-5-4(1) (Supp. 1989); Reagan Outdoor Advertising, Inc. v. Lundgren, 692 P.2d 776, 778 (Utah 1984).

2. See Utah Code Ann. § 70A-3-303 (1990).

We need not,therefore, reach the issue of whether the court correctly allowed Melanie to assert the statute of limitations on behalf of David.[3]

We affirm.

Pamela T. Greenwood, Judge

WE CONCUR:

Norman H. Jackson, Judge

Gregory K. Orme, Judge

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3. In its findings, the trial court noted that the property which was to secure the $20,000.00 note was awarded to Melanie in the divorce proceedings; that David had filed a bankruptcy petition in which he sought to discharge debts to both his mother and Melanie; and that "the potential for collusion on the part of [Thomas] and [David] is obvious and unfair to [Melanie]." For these reasons, the court found that even though David did not raise the statute of limitations as a defense in his answer, Melanie could do so on his behalf, to protect her own interest.